IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 02853

TRACY-ANN FULLER — Plaintiff

v

ALLIANZ AUSTRALIA INSURANCE LIMITED (ACN 000 122 850)
(and another according to the attached schedule) — Defendants

S ECI 2020 04230

JORDAN WILKINSON — Plaintiff

v

ALLIANZ AUSTRALIA INSURANCE LIMITED (ACN 000 122 850) — Defendant

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JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	16 July 2021
DATE OF RULING:	15 September 2021
CASE MAY BE CITED AS:	Fuller v Allianz; Wilkinson v Allianz
MEDIUM NEUTRAL CITATION:	[2021] VSC 581

PRACTICE AND PROCEDURE – Representative proceedings – Overlapping representative proceedings – Application to consolidate proceedings – Application for joint representation of plaintiffs – *Wigmans v AMP Ltd* (2021) 388 ALR 272 – *Southernwood v Brambles Ltd* (2019) 137 ACSR 50 – *Perera v GetSwift* (2018) 263 FCR 92 – *Klemweb Nominees v BHP* (2019) 369 ALR 583 – Exercise of power to give effect to overarching purpose of the *Civil Procedure Act 2010* (Vic) – *Supreme Court Act 1986* (Vic), s 33ZF.

APPEARANCES:	Counsel	Solicitors
For the Fuller Plaintiff	Mr C Withers SC Mr A Hochroth	Johnson Winter & Slattery
For the Wilkinson Plaintiff	Mr L Armstrong QC Mr D Fahey	Maurice Blackburn
For the Defendants	Mr B Walker SC Mr T Warner Ms A Hammond	King & Wood Mallesons

HER HONOUR:

PART A Introduction and background

1 Jordan Wilkinson and Tracy Ann-Fuller have commenced overlapping representative proceedings under Part 4A of the *Supreme Court Act 1986* (Vic) against Allianz Australia Insurance Limited[1] for claims arising out of the sale of "add-on" insurance products to consumers at the point at which they purchased cars or motorcycles from motor vehicle dealers. The products include loan protection ("consumer credit") insurance, purchase price ("GAP" or "shortfall") insurance, extended motor warranties and tyre and rim insurance. Broadly, the plaintiffs claim compensation for misleading or deceptive conduct, unconscionable conduct or unjust enrichment in relation to the sale of the insurances. The claims are disputed.

2 There is significant overlap between the proceedings, but they are not identical. Each has been commenced as representing an "open class". Mr Wilkinson and Ms Fuller (together, the **plaintiffs**) bring a joint application for consolidation of the proceedings, in particular the plaintiffs seek, in substance:

(a) an order under rule 9.12 of the *Supreme Court (General Civil Procedure) Rules 2015* (**Rules**) and s 33ZF of the *Supreme Court Act 1986* (Vic) (**the Act**) that the proceedings be consolidated, appointing each of them to be joint plaintiffs in the consolidated proceeding;

(b) that their respective solicitors, Maurice Blackburn and Johnson Winter & Slattery (**JWS**) be granted leave to be jointly named as solicitors on the record for the plaintiffs in the consolidated proceeding, subject to the provision of undertakings to be given to the Court:

(i) by each of the plaintiffs to, enter into a co-operative litigation protocol (**Protocol**) (the terms of which are discussed below) and to instruct his or her solicitors to comply with the Protocol in conducting the

[1] Allianz Australia Life Insurance Limited is also a defendant to Ms Fuller's proceeding, but not a defendant to Mr Wilkinson's proceeding

consolidated proceeding;

(ii) by each of Maurice Blackburn and JWS, to conduct the consolidated proceeding in accordance with the Protocol;

(c) that subject to further order, costs incurred in each proceeding be costs in the consolidated proceeding;

(d) that the cost of any work performed in the consolidated proceeding on and after the date of these orders that is performed by reason of there being two firms of solicitors jointly representing the plaintiffs rather than one firm (**Duplicated Work**),

(i) not be recoverable against group members in the consolidated proceeding;

(ii) not be recoverable against the defendants in the consolidated proceeding;

(**Cost Limiting Orders**);

(e) for the appointment of a "costs referee" pursuant to rule 50.01 of the Rules and s 33ZF of the Act for the purposes of identifying any duplicated work being performed by the lawyers acting in the consolidated proceeding as the proceeding progresses, with the costs of the referee to be borne equally by the plaintiffs in the consolidated proceeding.

3 The plaintiffs contend, in short, that the proposed consolidation is in the interests of group members and will also promote the overarching purpose[2] because it allows the claims of all group members to be determined without delay or deferral, in a single proceeding. Because of the terms on which the consolidation is sought, group members will not be exposed to additional costs by reason of the order permitting two solicitors on the record, and will be represented by appropriately experienced lawyers. The proposed consolidation orders will not prejudice the defendants'

2 *Civil Procedure Act 2010* (Vic) s 7.

interests. The defendants will not have to defend multiple proceedings and because of the terms on which consolidation is sought, they will not be exposed to additional costs.

4 The defendants oppose the application. They say that the inevitable result of permitting two firms of solicitors to appear on the record will be the inflation of the costs that would otherwise be incurred, compared with the relevant alternative – that one of the cases is stayed and the other proceeds. The costs will be to the account of the plaintiffs but the defendants may be exposed to the risk of paying a portion of the plaintiffs' costs in the event that the proceeding is unsuccessful.

5 Separately but relatedly, they contend that the problem of multiplicity should be determined together with the applications that each of the plaintiffs have foreshadowed for group costs orders (or GCOs) pursuant to s 33ZDA of the Act. The Court should reject the application for consolidation and instead require the parties to contest a "carriage motion", putting forward competing proposals for the conduct of their respective proceedings, in relation to which the defendants would move for a stay of one of the proceedings (they did not say which one). Were the plaintiffs required to put forward competing group costs order proposals in the context of a competitive carriage motion, there would be a "real substantial possibility" that the parties would nominate lower proposed GCO percentage rates than they would otherwise jointly seek in respect of a consolidated proceeding, with the result that any GCO made by the Court in respect of whichever one of the proceedings was permitted to continue, would be lower than any group cost order that the Court might make in respect of the proposed consolidated proceeding. Group members and the defendants would thereby be exposed to lower costs.

6 On the subject of group costs orders the defendants said that the interaction between questions of multiplicity and such orders present novel questions that should be decided in these cases, in the context of a competition between the proceedings. Finally, the defendants said that there was no basis to depart from the ordinary rule that there be one firm of solicitors on the record; there being no real benefit to group

members, only a benefit flowing to the law firms.

7 It was not in dispute that the Court has power to order a consolidation of the proceedings and to appoint two solicitors to act on the record. The question is whether the proposed orders are an appropriate exercise of discretion in the circumstances of this case.

8 For the reasons that follow, the plaintiffs' application for consolidation of the proceedings *Jordan Wilkinson v Allianz Australia Insurance Limited* (S ECI 2020 04230) (**Wilkinson proceeding**) and *Tracy-Ann Fuller v Allianz Australia Insurance Limited & Anor* (S ECI 2020 02853) (**Fuller proceeding**), and leave for Maurice Blackburn and JWS to be named jointly as solicitors on the record for the joint plaintiffs in the consolidated proceeding, will be granted, on the terms set out in the **Annexure**.

Part B - Legal framework – Overlapping Representative Proceedings

9 The principles governing applications of this kind are well developed. They have been worked out in numerous cases, for the most part in the Federal Court (including in the Full Court of that Court) and in the New South Wales Supreme Court and Court of Appeal, under Part IVA of the ***Federal Court Act*** *1976* (Cth) and Part 10 of the ***Civil Procedure Act*** *2005* (NSW), which are near-identical cognates of Part 4A of the Victorian *Supreme Court Act*.[3] Those principles were recently endorsed by the High Court in ***Wigmans*** *v AMP Ltd*.[4] Although the principles are well understood, they repay re-stating on this application, for reasons that will become clear.

10 The starting point is that there is no provision in Part 4A or its equivalents that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. To the extent that proposition was

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3 The question of overlapping group proceedings has only been considered once previously in this Court, in *Stallard v Treasury Wine Estates Ltd* [2020] VSC 679 (***Treasury Wine***), in which the plaintiffs, like the plaintiffs here, sought an order for consolidation.

4 *Wigmans v AMP Ltd* (2021) 388 ALR 272 (Gageler, Gordon and Edelman JJ) (***Wigmans HCA***), 299 [106]; citing *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR 41-679; [1999] FCA 56 (***Johnson Tiles***); *Kirby v Centro Properties Ltd* (2008) 253 ALR 65 (***Kirby***); *Smith v Australian Executor Trustees Ltd* [2016] NSWSC 17; *Cantor v Audi Australia Pty Ltd (No 2)* [2017] FCA 1042; *McKay Super Solutions Pty Ltd (as trustee for the McKay Super Solutions Fund) v Bellamy's Australia Ltd* [2017] FCA 947 (***Bellamy's)***; *Perera v GetSwift Ltd* (2018) 263 FCR 92; *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1.

contested, it was resolved by the High Court in *Wigmans*. As the High Court said in *Wigmans* (of the equivalent Federal and New South Wales provisions), the fact that there may be multiple proceedings which overlap in various ways is not inconsistent with one objective of Part IVA,[5] which is to increase efficiency in the administration of justice. The legislation poses, but does not answer, the multiplicity question.[6] As the Full Court of the Federal Court said earlier in *Perera v* ***GetSwift*** *Ltd*,[7] the object of Part IVA is facultative, not restrictive, and in permitting more efficient dispute resolution through group proceedings Part IVA "does not insist on the *most* efficient means of dispute resolution".[8]

11 That fact must be understood in light of an equally foundational principle, which is that multiplicity of proceedings is not to be encouraged and competing representative proceedings may be inimical to the administration of justice.[9]

12 Multiple representative proceedings against the same defendant on overlapping subject matter do not therefore constitute an abuse of process, but a problem for courts to solve.[10] The factors that might be relevant to managing competing group proceedings cannot be exhaustively stated and will vary from case to case.[11] The task is one of ensuring justice is done in the proceedings that have been commenced, where courts must be astute to protect the best interests of group members.[12]

13 Orders facilitating the management of multiple overlapping representative proceedings are commonly made under the provisions equivalent to s 33ZF of the Act, in the *Federal Court Act* (s 33ZF), and the *Civil Procedure Act NSW* (s 183). Section 33ZF confers on the court a broad power which extends to encompass all procedures, including interlocutory orders, necessary or appropriate to bring the matter to a fair

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5 Part IVA of the *Federal Court Act 1976* (Cth) is in almost identical terms to Part 4A of the *Supreme Court Act 1958* (Vic).
6 *Wigmans HCA*, 291-2 [77].
7 *Perera v GetSwift Ltd* (2018) 263 FCR 92 (Middleton, Murphy and Beach JJ) (***GetSwift***).
8 *GetSwift,* 126 [148].
9 *Wigmans HCA*, 299 [106].
10 *Wigmans HCA,* 300 [107] citing *GetSwift* at [150].
11 *Wigmans HCA*, 300 [109].
12 *Wigmans HCA*, 300 [109], 302 [116]–[117].

hearing on a just basis.[13] In exercising a power of this kind the court has a protective role in respect of group members, whose interests are to be given primary consideration.[14] Where a proposal to resolve a multiplicity problem affects the defendant, its interests are also relevant. The interests of funders and law-firms acting in representative proceedings are not.[15]

14 The defendants' characterisation of the staying of one or other of the competing proceedings as the "orthodox" approach to resolving the problem of multiplicity was erroneous. Successive courts, including the High Court, have recognised that there is no "one size fits" all solution to the multiplicity problem. Multiplicity may be resolved in a number of ways including the staying of one or more overlapping proceedings, the consolidation of proceedings, the joint management and joint hearing of proceedings (without staying any of them or consolidating them), also employing at times, the "closure" of open classes in conjunction with other options. Staying all but one set of proceedings is far from the only possible solution.[16] As the New South Wales Court of Appeal said in *Wigmans,* there are various permutations and there is, and should be, an inherent flexibility as to how the vice of multiplicity (which also appears in other contexts such as trans-national litigation), should be handled.[17]

15 Each solution may be unsatisfactory in one way or another. As the Full Court of the Federal Court has observed, there is no one right answer to questions that arise in this context and no "silver bullet" solution to a problem that may require weighing incommensurable and competing considerations, about which judges may take different views.[18]

16 In *Wigmans*, although not deciding whether to permit consolidation (it was not proposed in that case) the High Court recognised that consolidation of competing

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13 *BMW Australia Ltd v Brewster* (2019) 374 ALR 627, 638 [45], 640 [54] (Kiefel CJ, Bell and Keane JJ, Nettle and Gordon JJ agreeing) (***Brewster***) (citing *Johnstone v HIH Ltd* [2004] FCA 190).

14 *Wigmans v AMP Ltd* (2019) 103 NSWLR 543, 345 [103]–[104] (Meagher and Payne JJA) (***Wigmans NSWCA***); *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1, 7-8 [14]-[15] (Allsop CJ) (***Wileypark***).

15 See for example, *Kirby*, 68–9 [9]–[12], 72 [28] (Finkelstein J); *Wileypark*, 7–8 [14]–[18] (Allsop CJ).

16 *Wigmans HCA*, 299 [106]; *Wigmans NSWCA*, 326 [8]–[9] (Bell P).

17 *Wigmans NSWCA*, 326 [8]–[9] (Bell P).

18 *GetSwift*, 151–2 [274].

proceedings is one solution among others, to the question posed by the legislation permitting group proceedings.[19] The New South Wales Court of Appeal said (also in *Wigmans*) that consolidation was in fact the tool most commonly deployed to address the problem of multiplicity.[20]

17 Well before the enactment of Part 4A and its cognates, courts have looked to the consent of the parties to fashion the means of dealing with the vice of multiplicity of civil suits against a defendant.[21] It has been recognised in the context of contemporary representative proceedings that while there is power to consolidate even without the parties' consent, consolidation as a solution to multiplicity will usually only be employed where there is agreement between the parties, solicitors and any funders, and in the absence of agreement substantive practical difficulties can arise.[22]

18 Because consolidation of overlapping group proceeding is most commonly facilitated by the consent of the parties, it has arisen for consideration in conjunction with the question whether the legal representatives of the parties should be permitted to jointly appear on the record in a consolidated proceeding in which those parties become joint plaintiffs. As discussed below, there is now a well-established line of cases permitting joint representation in these circumstances, subject to the requirement that the future conduct of the consolidated proceeding is likely to be consistent with the interests of group members and with the overarching purpose, and not prejudicial to the defendants.[23]

19 A just resolution of a dispute is to be understood in light of the purposes and objectives of the *Civil Procedure Act 2010* (Vic) (the **CPA**) and like provisions, and the public interest in avoiding delay and expense in the administration of justice.[24] In exercising

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19 *Wigmans HCA*, 299 [106] n 146.

20 *Wigmans NSWCA*, 335 [54] (Bell P).

21 *Amos v Chadwick* (1878) 9 Ch D 459, 462-3 (as cited in *Wigmans HCA*, 297 [99]).

22 See *GetSwift*, 106–8 [48]–[59]; *Southernwood v Brambles Ltd* (2019) 137 ACSR 540, 544 [13] (Murphy J) (***Southernwood***) and the authorities summarised there at 549–59 [40]–[42] (Murphy J); *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 2)* [2019] FCA 1061; c.f. *Pallas v Lendlease Corporation Ltd* [2019] NSWSC 1631, [8] (Hammerschlag J).

23 See for example *Klemweb Nominees v BHP* (2019) 369 ALR 583, 615-17 [155]–[160] (Lee J, Middleton and Beach JJ agreeing at 590, [34]) (***Klemweb***).

24 *GetSwift*, 123–5 [137]–[141]; *UBS AG v Tyne* (2018) 265 CLR 77, 93–4 [38] (Kiefel CJ, Bell, Keane JJ), 104–5 [70]–[72] (Gageler J).

the power conferred by s 33ZF I am required to seek to give effect to the overarching purpose defined in the CPA (which is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute), and to further that purpose by having regard to objects set out in the CPA which include:[25]

(a) the just determination of the proceeding;

(b) the public interest in the early settlement of disputes by agreement between the parties;

(c) the efficient conduct of the business of the Court and the efficient use of judicial and administrative resources;

(d) minimising any delay between the commencement of the proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for the fair determination of the real issues in dispute and the preparation of the case for trial;

(e) the timely determination of the civil proceeding

20 In the context of the requirement of the judicial system to accommodate the particular problem presented by overlapping group proceedings, courts (including the High Court) have recognised the importance of these values as expressed in like legislation, in particular the fact that integral to a just resolution of a civil dispute is the minimisation of delay and expense, having regard to the efficient use of the Court's resources.[26]

Part C – present proceeding and proposed consolidation

21 The Fuller proceeding was commenced on 7 July 2020. An amended statement of claim was filed in September 2020 and a defence in October 2020. JWS represents the plaintiff in that proceeding. The Wilkinson proceeding was commenced on 11 November 2020. Maurice Blackburn represents the plaintiff in that proceeding. The proceedings overlap, but there are some differences, including in respect of group

25 CPA, ss 7–9. See, in a different context, *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 at 311 [25] (Redlich and Priest JJA, Macaulay AJA).

26 *Wigmans HCA*, 290–1 [74]; *Get Swift*, 123–5 [137]–[141].

membership.

22 The Fuller proceeding is issued on behalf of all persons who:[27]

(a) at any time during the period 1 June 2006 to 7 July 2020 inclusive purchased one or more of the defined add-on insurance products at or around the time they purchased a motor vehicle or motorcycle from a vehicle dealer;

(b) in conjunction with that purchase were issued one or more of the add-on insurance products by Allianz (the first defendant) or Allianz Life (the second defendant);

(c) became liable to pay (directly or indirectly), a premium to one of the defendants for the add-on insurance products;

(d) have suffered loss or damage by reason of the conduct the subject of the claim.

23 The Wilkinson proceeding is brought on behalf of all persons who:

(a) at any time between 1 June 2006 and 11 November 2020 purchased a motor vehicle or motorcycle from a dealer who was an authorised representative of Allianz for the purpose of arranging insurance for customers of the dealer in connection with the customer's purchases of vehicles;

(b) purchased the said vehicle using loan finance arranged by the dealer and in conjunction with that purchase, also purchased any of the defined add-on insurance products. (Those products are not identical to the products the subject of the Fuller proceeding in that they not only include products *offered* by Allianz, but also those *underwritten* by Allianz Life and OnePath Life Limited (**OnePath**));

(c) by reason of those purchases made premium payments to Allianz directly or indirectly;

(d) have suffered loss or damage by reason of the conduct the subject of the claim;

(e) there are like exclusions in the group definition.

24 The group of persons represented in the Fuller proceeding is broader than in the Wilkinson proceeding to the extent that in the Fuller proceeding group members are not required to have purchased their vehicles using finance arranged by car dealers, which is a requirement for group members in the Wilkinson proceeding. On the other hand, the Wilkinson proceeding extends to products underwritten by Allianz Life and

[27] The group definitions for each proceeding are set out here in substance, omitting some detail.

another insurer, OnePath, whereas the Fuller proceeding covers products issued by Allianz and Allianz Life only.[28] The period in the Wilkinson proceeding extends to November 2020, whereas the period for the Fuller proceeding ceases at 7 July 2020. Allianz Life is a defendant to the Fuller proceeding, but is not a defendant to the Wilkinson proceeding. Wilkinson alleges contraventions of personal advice obligations contained in ss 961B and 961J, or in the alternative s 961L, of the *Corporations Act 2001* (Cth). The Fuller proceeding does not.

25 If an order for consolidation is made, the plaintiffs will file a consolidated statement of claim incorporating the additional causes of action from the Wilkinson proceeding and including a common relevant period and group definition. The amended proceeding will permit the claims of group members in both proceedings to be prosecuted in a single proceeding.[29]

26 The consolidation proposal is that Maurice Blackburn and JWS be joint solicitors in the consolidated proceeding, subject to the provision of undertakings by each plaintiff and each law firm to the effect set out above. The undertakings provide for the entry into and compliance with the proposed Protocol. The Protocol reflects in almost identical terms the protocol that I approved in an earlier case, *Stallard v Treasury Wine Estates Ltd and Napier v Treasury Wine Estates Ltd* (***Treasury Wine***).[30] It sets out a number of mechanisms aimed at facilitating effective collaboration between Maurice Blackburn and JWS. It provides for the unification of decision-making, counsel teams, administrative processes and the joint conduct of all common aspects of the consolidated proceeding.

27 The central elements of the proposal for the conduct of a consolidated proceeding with joint solicitors, are these:

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28 In the Wilkinson Proceeding it is alleged that Allianz (the defendant in that proceeding) offered the add-on insurance products on its own behalf or on behalf of Allianz Life or OnePath as their agent. Allianz Life and OnePath underwrote the "Trauma and Death" component of one of the products (the Loan Protection Insurance product).

29 Solicitors for the respective plaintiffs gave evidence that that would occur.

30 See in particular the orders in the Annexure in *Treasury Wine.*

(a) Ms Fuller instructs JWS and Mr Wilkinson instructs Maurice Blackburn;

(b) Each of Fuller and Wilkinson undertakes to the Court to enter into a Protocol for the joint conduct of the proceeding and to instruct his or her solicitors to comply with the Protocol in conducting the proceeding;

(c) Each of Maurice Blackburn and JWS undertakes to the Court to conduct the proceedings in accordance with the Protocol;

(d) The interests of group members is to be the primary consideration in interpreting and giving effect to the Protocol, which includes provisions to the following effect:

(i) One set of counsel will be briefed to represent the plaintiffs and group members in the consolidated proceeding;

(ii) The plaintiffs will nominate one address for service and will jointly conduct correspondence with the defendants and the Court, save where it is agreed between them that one firm will conduct the correspondence on behalf of both of them. The effect is that as far as the Court and the defendants are concerned, the joint plaintiffs and their representatives will be acting as one;

(iii) The plaintiffs will jointly make and respond to interlocutory applications, jointly retain and brief expert witnesses, and jointly make and receive discovery (using the nominated agreed form of document management software, and such that the defendants do not have to produce discovery to the two plaintiffs separately);

(iv) Work is to be distributed between the firms on a 50/50 basis with the objective of avoiding duplication of cost and effort, in a manner which insofar as is possible ensures the number and seniority of personnel conducting a task will be no more than if there were a single firm conducting the proceeding;

(v) The solicitors will convene a litigation committee comprising two lawyers from each firm (initially Mr Watson and Mr Buitendag), that will be responsible for managing the litigation, making major decisions in the litigation (which are defined) and determining the equal distribution and co-ordination of work between the firms. The litigation committee is to operate by unanimous agreement, and where the litigation committee is unable to reach unanimous agreement on any decision relating to the proceeding, the matter will be referred to the most senior counsel retained in the proceeding, or to an independent adjudicator, whose decision will be binding;

(vi) Maurice Blackburn and JWS are to work together to avoid duplication of work;

(vii) An independent costs referee is to be appointed for the purpose of conducting six monthly inquiries and preparing written confidential reports on the question whether there is any duplicated work;

(viii) The Protocol may only be terminated or materially amended by order of the Court;

(e) The plaintiffs seek orders that any costs of work performed in the consolidated proceeding by reason of there being two firms jointly representing the plaintiffs rather than one firm not be recoverable against group members or defendants (the **Cost Limiting Orders**).

28 The intended effect of the Protocol as far as the defendants are concerned is that they will be dealing as though with a single legal team acting for the joint plaintiffs.

29 The Protocol contains measures specifically intended to minimise the prospects that the joint engagement of two firms of solicitors will give rise to duplication in costs, but the Cost Limiting Orders are the most direct means of protecting group members and the defendants against exposure to costs consequent upon duplicated work.

30 The proposed arrangements (the terms on which consolidation is sought), like those in *Treasury Wine*, differ in two respects from the arrangements permitted by the Federal Court in other cases, namely that Cost Limiting Orders are sought at the outset, and that the Protocol is to be the subject of undertakings to the Court by each plaintiff and each firm of solicitors (by their nominated representative).

31 The plaintiffs also propose to enter into a Cooperation Agreement that concerns the mechanics of costs sharing between the plaintiffs. It provides, for example, that disbursements will be shared 50/50 between JWS and Maurice Blackburn, and anticipatory arrangements for distribution of GCO proceeds, in the event a group costs order is made in the consolidated proceeding.

32 On the question of funding for the proceedings, which is related to the question of costs, Maurice Blackburn acts for the plaintiff in the Wilkinson proceeding on a 'no-win, no-fee' basis. JWS acts for the plaintiff in the Fuller proceeding in effect on a 'no-win, no-fee' basis, as far as the plaintiff is concerned. For the purposes of funding this arrangement JWS has entered into a limited recourse loan with a third party funder, **Balance** Legal Capital I UK Ltd. If JWS receives payment following a successful outcome, Balance will be entitled to components of that payment, however Balance has no direct recourse to the plaintiff or group members. Each of the plaintiffs have foreshadowed an intention to seek a group costs order under s 33ZDA of the Act, which if granted, would replace their present funding arrangements. The plaintiffs have each indicated that in the event that orders for consolidation and joint representation are made, the joint plaintiffs will apply to the Court for a GCO, but that the proposal for consolidation is not contingent upon the Court making a GCO.

33 The proposal for joint conduct of the proceeding on the terms of the Protocol was not made in a vacuum. It was supported by the evidence of the principals of both law firms, who gave evidence on this application.

34 Mr Andrew Watson is a principal of Maurice Blackburn and has, since 2011, been head of its Class Actions Division. He has conducted, participated in or supervised more

than 50 representative proceedings on behalf of plaintiffs or applicants, approximately 24 of which are current or pending. He has conducted class actions jointly with other firms on numerous occasions. He has extensive knowledge of and experience in relation to the issues arising in consumer class actions and conducting such actions on a cooperative basis.

35 Maurice Blackburn has acted cooperatively with other firms in a number of matters, including *Stallard and Napier v Treasury Wine Ltd* (conducted jointly with Slater & Gordon in this Court);[31] *Impiombato v BHP Group Ltd* (conducted in the Federal Court jointly with Phi Finney McDonald);[32] *McKay Super Solutions Ltd (Trustee) v Bellamy's Australia Ltd* (conducted in the Federal Court jointly with Slater & Gordon), settling for $50 million in 2019;[33] and *Hadchiti v Nufarm Ltd* (conducted in the Federal Court jointly with Slater & Gordon) and settling for $46.6 million in 2012.[34]

36 On the basis of his experience and informed by his inquiries in relation to the matters that Maurice Blackburn has conducted, Mr Watson's opinion was that the conduct of the proposed consolidated claim jointly with JWS according to the Protocol would likely have the effect of minimising duplication and creating efficiencies, and that Maurice Blackburn's successful track record and experience to date in conducting class actions jointly with other law firms would enable it to work effectively and efficiently with JWS in a consolidated proceeding. Mr Watson said that to date, the joint conduct of the *Treasury Wine proceeding* by Maurice Blackburn and Slater & Gordon has been functioning well; the firms have successfully adopted processes in compliance with the protocol in that proceeding, with the firms working in a unified way.

37 Mr Buitendag is a partner of JWS and the Practice Group Head of Dispute Resolution. He was previously a partner at Cornwalls Lawyers, where he was the Practice Group Leader of Commercial Litigation and the Head of Reconstruction and Insolvency.

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31 S ECI 2020 01590 (***Treasury Wine proceeding***).
32 VID649/2018.
33 VID163/2017.
34 NSD 1847/2010.

Before that, he was managing partner of a law firm in Pretoria, South Africa for 14 years. He has had primary carriage of, or played a key role in the conduct of numerous complex proceedings in superior courts, including class actions acting for both plaintiffs and defendants. JWS has broad experience in representative proceedings, including in a proceeding of very similar subject matter.

Part D – Analysis – Effect of the Proposed Consolidation

Consolidation permits the claims of group members to be advanced now, in a single proceeding

38 An order consolidating the proceedings will have the result that without the need to take further steps, the claims of all group members will be advanced in a single proceeding. I consider that to be a meaningful, substantive benefit to group members that supports the making of an order for consolidation, subject, importantly, to being satisfied in respect of the proposed arrangements for the conduct of the proceeding and the question of costs, in both instances having regard to the primacy of group members' interest and the need to avoid prejudice to the defendants.

39 The defendants' preferred alternative was that the application be dismissed and a contest over which proceeding would continue be heard and determined, with one of the proceedings stayed and the other continuing. The defendants did not engage with any other alternative, such as the "de-classing" or "closure" or one or other proceeding or a "wait and see" in which both proceedings would continue with the possibility of a joint trial.

40 Whatever alternative course were to be taken would involve additional steps by group members and the plaintiffs that will be unnecessary if a consolidation order is made. Were the defendants' preferred outcome adopted, one proceeding would be stayed. Depending upon which proceeding were stayed, some group members may not be included in the proceeding that continues. That is not to say that generally speaking, those consequences are incapable of management. Those solutions have been employed by courts in other cases where necessary. It is to say, however, that each

alternative would entail cost, delay and inconvenience,[35] accepting that those factors cannot be quantified in this context.

41 The defendants did not engage with these factors in contending that the plaintiffs should be forced to a contest. They did not engage with which of the proceedings should be stayed. Their submission was directed to the need for the plaintiffs to be refused this application so that they could separately bring different applications, on which the defendants would move for a stay.

42 The defendants did not seriously press the proposition that consolidation of the proceedings be ordered without the consent of the plaintiffs, in the manner of ***Pallas*** *v Lendlease Corporation Ltd*.[36] They did however, say that the plaintiffs and the two firms could make private contractual arrangements for the sharing or sub-contracting of work connected with the proceedings.

43 Ultimately the defendants' opposition to consolidation rested on the need to avoid "inevitable large scale" duplication of costs that would occur by reason of joint representation, with the related consequence that the court would avoid the spectre of two solicitors on the record. Furthermore, the defendants submitted that a contested carriage dispute would result in a better return to group members in the event that the Court were to make a group costs order in whichever proceeding is not stayed.

44 Having regard to the views I have reached in relation to the costs issues, I do not consider that the defendants' submissions takes seriously the injunction that in exercising a power or discretion including on the present application the Court must seek to further the overarching purpose by having regard to objects set out in the *CPA*, including the efficient conduct of the business of the court, the efficient use of judicial and administrative resources and the minimising of any delay between the commencement of the proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for the fair determination of the

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35 See *GetSwift*, 151-2 [274].

36 *Pallas v Lendlease Corporation Ltd* [2019] NSWSC 1631 (Hammerschlag J) (***Pallas***).

real issues in dispute and the preparation of the case for trial. The defendants' proffered alternative seeks the speculative result of an increased return to group members (and potentially lesser exposure to costs itself should it be ordered to pay adverse costs should the proceeding fail) by requiring a different form of solution to the problem of multiplicity than the one reached by agreement between the plaintiffs.

Costs Associated with two solicitors on the record

45 In my assessment the proposed arrangements have the characteristics that will facilitate a joint team comprised of lawyers from both firms acting consistently to prosecute litigation on behalf of plaintiffs and group members; that is, to act *as one*, when conducting the litigation, including when engaging with the Court and the defendants.

46 I do not accept the defendants' submission that a team comprised of lawyers from two firms would have the necessary consequence that all senior lawyers ("from at least the level of Senior Associate up") would have to be across all aspects of the litigation and all materials, even when carrying out the most discrete of tasks. The submission presents as an exaggerated characterisation of the manner in which litigation might be conducted within a single firm. The articulation of objectives and standards for the allocation of work and for decision making in the Protocol, in my assessment, makes transparent assumptions of the kind that would likely underlie the conduct of significant litigation within a single firm, by the assignment of work within teams headed by more senior lawyers.

47 I accept the defendants' submission that the principals of both firms will ultimately have to be satisfied that the conduct of the litigation is consistent with their responsibilities to the Court, their clients and group members. Implementation of the Protocol can be reasonably expected to curtail the occurrence of legal work and therefore the incurring of legal costs that occur by reason of joint representation. I accept that the joint process will give rise to some work that would otherwise not be required, and therefore some costs that would otherwise not be incurred. Senior lawyers at the firms will be required to communicate at a senior level in order to

manage the joint process, and to implement certain administrative systems, including for record keeping and account payment. Processes will need to be established and maintained, allowing the plaintiffs' firms to communicate with each other, and to communicate jointly with third parties. That will occur with the objective of establishing and maintaining a single legal team comprised of lawyers from both firms. While the defendants' assertion that there will be *widespread* duplication of legal costs was simply an assertion, the fact is that the generation of some legal work and consequent costs by reason of joint representation cannot be eliminated.

48 Significantly though, joint representation is sought on terms *precluding recovery* by the solicitors of the costs of *any* duplicated work from group members and from the defendants. The defendants did not, in their submissions, substantively engage with the significance of this element of the plaintiffs' application.

49 It does not appear that Cost Limiting Orders have been required as a condition of joint representation in the Federal Court decisions in which it has been permitted. The observations of the Full Court of the Federal Court in *GetSwift* to the effect that consolidation invites additional costs, must be read in that light.[37]

50 I take the view that the proposed Cost Limiting Orders are an appropriate, necessary and effective protection against group members and defendants bearing the costs of joint representation. Joint representation is facilitative of a consent-based solution to the multiplicity question. Its cost – some duplicated work and resulting legal costs – should be borne by the solicitors who wish to appear jointly on the record. The orders to be made in this case will have that consequence.

51 Although the costs of any duplicated work will not be visited on group members or defendants, to the extent that the generation of legal costs is a matter of interest more generally in the administration of justice, it is relevant that an order precluding the recovery of costs for duplicated work ought serve as a potent incentive to the solicitors to curb duplication.

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[37] *GetSwift,* 106-7 [46]–[51], 151-2 [274].

52 The defendants submitted that were a group costs order to be made in a consolidated proceeding it would create a perverse incentive on the plaintiffs to *increase* their own costs so as to inflate the amount of costs that they might eventually recover against the defendants, should the proceeding go to judgment and the plaintiffs obtain an order for costs against the defendants. The submission was speculative and not evidence based.

53 That submission also failed to account for, indeed studiously avoided, the effect of the Cost Limiting Orders. As the terms of s 33ZDA make clear, where a group costs order is ordered it determines the manner in which the fees payable to the law practice representing the plaintiff and group members are *calculated*. The Cost Limiting Orders which are concerned with the *recovery* of costs against group members and the defendants, will take effect regardless of whether or not a group costs order is made in the future. Were there any doubt about that in the abstract (and none was suggested) it would be beside the point, because the plaintiffs' application for joint representation was conditional on their consent to the making of the Cost Limiting Orders.

54 The submission further failed to account for the fact that consolidation with joint representation is sought by the plaintiffs on terms that they will undertake to the Court to conduct the consolidated proceeding as required by the Protocol, and that the solicitors will themselves undertake to the Court, to do so. Those undertakings will not cease to have effect in the event that a group costs order is made in the future. The application for consolidation is conditional upon the provision of the undertakings, as is the orders I will make on this application. It also failed to take into account the court's supervisory jurisdiction in approving any settlement of the proceeding (including any allowance for costs) under s 33V of the Act.

55 The defendants emphasised the fact that the appointment of a "costs referee" would provide no real comfort to them because a referee could only report upon and not control the incurring of duplicated legal work and resulting costs. The defendants were correct to say that the role of the referee is to identify and report on duplicated

work and resulting costs. The submissions misapprehended the intended significance of the costs referee. The referee is to be assigned that task so that Duplicated Work can be identified more or less contemporaneously, and the reports are to serve as a forensic tool that may be used in any costs assessment required at the end of the litigation. In that context (in the event that the defendants' liability to pay the plaintiffs costs was in issue at the end of the litigation) the question whether the reports ought be adopted in whole or in part, would arise for consideration.

56 The defendants' submission that the referee will be set an undesirable task of assessing "a double layer of hypotheticals", identifying not only duplicated work but also "*costs that have only been incurred due to the solicitors' decision to incur greater costs in light of a GCO*" rests on a mistaken and unproven factual premise. The costs referee is to be assigned a confined and particular task, namely to identify and report on Duplicated Work.

Current funding arrangements

57 The Wilkinson and Fuller proceedings presently have different funding arrangements. The plaintiffs propose to move to a single form of funding via a GCO, should consolidation be permitted and subsequently, should a GCO be made. Were a GCO made, s 33ZDA(1)(b) would require that liability to pay legal costs be shared among the plaintiffs and group members.

58 In the event that a group costs order were refused it would be necessary for the plaintiffs in the consolidated proceeding to revisit the basis of the funding of the proceeding so as to ensure that the funding arrangements are equitable as between all group members. Counsel for the plaintiffs informed the Court that the likely position would be that the proceeding would be funded on a "no-win no-fee" basis.

59 The appropriate time at which to address alternative funding arrangements is after the foreshadowed application for a GCO has been determined, and in the event that it is unsuccessful. I reject the submission that the circumstance that no definitive arrangements have been put in place at this stage to account for precisely what will occur in that event, is a reason to refuse the present application. Funding

arrangements in representative proceedings can and do change, and when they do, they are notified to group members in a court ordered process. I do not intend at this stage to make orders directed to a hypothetical situation.

Foreshadowed application for Group Costs Order

60 The defendants submitted that this case should be distinguished from other cases in which courts have dealt with overlapping class actions because the plaintiffs foreshadow making an application for a group costs order. The submission was put this way: no courts in Australia have considered the question of multiplicity between competing class actions in the context of a potential group costs order. The need to consider rival group costs orders will "provide valuable guidance" in relation to the factors that should inform the making of any GCO. The plaintiffs' application would remove the possibility that such guidance may be obtained. Furthermore, "early consolidation" would eliminate competitive pressure with the result that group members would inevitably pay a greater percentage, if a group costs order is made, than they might have otherwise paid. Determining the plaintiffs' consolidation application without considering competing applications for GCOs would be to "artificially" segregate the issues that might inform group members' interests.

61 Properly understood, the gravamen of the defendants' submission was that consolidation should be refused because their preferred alternative (a stay of one proceeding after a disputed carriage contest) had the prospect of generating a proposal by one or both parties for a lower GCO than their solicitors will jointly seek. It was submitted that I should find "as a real substantial possibility" that consolidation with joint solicitors on the record would result in a proposal for a higher GCO rate than under a carriage motion scenario.

62 The first and fundamental difficulty with the submission is that it was speculative. The basis on which I could and should draw the inference urged, was not identified. The submission was pitched as a general appeal to the effects of competition, without any evidence basis. The argument was elaborated only by the submission that in a carriage motion the plaintiffs would only be able to compete on the question of the

GCO percentage because their offerings were otherwise homogenous, and by pointing out that the plaintiffs could not lawfully collude on price.

63 As to the question of differentiation, I accept that the plaintiffs each, in their evidence, accepted that the other was competent and sufficiently experienced to jointly conduct a consolidated proceeding. However I also accept the plaintiffs' submission that in the event that consolidation were refused, they could and would seek to distinguish their service offerings. There is nothing in the evidence on this application, in which each accepts that the other is competent, that would preclude either firm from properly seeking to characterise their offering as superior to the other.

64 The second and related difficulty was that the analysis ignores the primacy of the Court's role in deciding whether to make a group costs order and in setting the rate to apply in any such order. Section s 33ZDA empowers the Court to make a GCO if satisfied that it is *appropriate or necessary to ensure that justice is done in the proceeding*. In that context the decision whether to exercise a discretion to make a GCO and the specification of a percentage rate will be linked. Considerations of proportionality and reasonableness will be relevant. The evaluative assessment required by s 33ZDA in any case, including in any GCO application in this case, will of necessity by made on the evidence before the court.[38] In making application for a group costs order, whether in the context of a contested carriage dispute or subsequent to an order for consolidation, the plaintiffs would bear the onus of satisfying the court, on sufficient evidence, as to an appropriate rate. It is not a matter of the applicant for a GCO nominating a percentage which the court adopts.

65 The plaintiffs emphasised the fact that the percentage fixed in any group costs order made early in the proceedings is provisional in the sense that it may be adjusted later, as expressly contemplated by s 33ZDA(3), which provides that "the Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a)". The power to adjust an order under that sub-section is not predicated on a party applying

38 See generally, *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (***Crawford v ANZ***).

for such an order. An adjustment may be made by reference to any relevant consideration, including of course, the eventual outcome of the proceeding.[39] The fact that the percentage rate set in a GCO might be later adjusted serves to diminish the significance of the context in which a GCO is first set, although it should be accepted that the rate set at the outset will at least, practically speaking, inform a later proposed adjustment. The rate first set would not however, determine for all time, the quantum of costs to which group members will be required to contribute. Furthermore, as far as group members are concerned, any settlement of the proceeding would be subject to the Court's well-established supervisory jurisdiction under s 33V of the Act. The fact that s 33ZDA(3) provides for the amendment of a GCO including as to the percentage ordered, is consistent with the presence of s 33V, within Part 4A of the Act.

66 The third difficulty is that the submission that the Court ought (perhaps even *must*) refuse consolidation in order to entertain competing applications over the price of legal representation, was not shown to be a necessary implication of the novelty or peculiar nature of the funding of group proceedings by the group costs order mechanism.

67 Any consent application for consolidation with joint representation, or indeed any application for consolidation "removes" whatever competitive tension would have been inherent in a disputed carriage contest on the question of price, whatever the funding models in play. It does not follow, however, that the resolution of a multiplicity problem by allowing consolidation is an exercise in "artificially bifurcating consideration of the factors that should inform the interests of justice", as the defendants put it. Taken to its logical conclusion, on the defendants' construction, faced with overlapping group proceedings a Court should seek to *create* price competition by requiring a contested carriage dispute even where the Court is otherwise satisfied that a consolidation of proceedings is appropriate. That approach to multiplicity is inconsistent with the principles that are now well established, as set out above.

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39 See *Crawford v ANZ*, [148].

68 The proposed form of funding in question in this case does not require departure from those principles. To the extent that the defendants sought to establish that funding of a representative proceeding via a group costs order raised inherently different questions, the submission did not rise above an assertion at best, and rested on unexposed assumptions about price competition in the asserted markets. The defendants' submissions, put very generally, appeared in part to be addressed to the potential undesirable consequences of making a group costs order, on the basis that on the defendants' characterisation, "a GCO by design, creates the potential for significant windfall profits to a law firm". Although it is not dispositive of this application, I do not accept that so-called windfall profits are an inevitable consequence where group costs order are made, for the reasons set out in *Crawford v ANZ*.[40] The relevant factors informing any future application for a group costs order will be explored when any such application is made.

69 Deciding the present application on the evidence before me is not an exercise in artificiality. Refusing to do so by rejecting the application in order in effect to create a market of sorts for the provision of legal services in this case, and to embark on the consideration of novel and interesting legal questions (as tempting as that invitation might be), is not in my assessment a course that is required by or consistent with the overarching purpose of the CPA or in order to adequately protect the interests of group members.

Conduct of the proposed consolidated proceeding with two solicitors on the record

70 The question of costs aside, the defendants did not take exception to any specific aspect of the Protocol for the joint conduct of a consolidated proceeding. Significantly, apart from the question of costs, they did not submit that any aspect of the proposed joint representation would prejudice the defendants' own interests in relation to the conduct of the litigation.

71 Instead, the defendants focused on the general spectre of permitting two firms of solicitors to appear on the record. It was said that the Court ought guard against the

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40 See *Crawford v ANZ,* [145]–[153].

prospects of a conflict between the interests of group members and the "mercantile" and "entrepreneurial" interests of the solicitors, and that what had driven the consolidation application was the solicitors' interests in "obtaining a piece of the action". The proposed consolidation suited the solicitors, not group members and in those circumstances, it was said, the Court ought be concerned to be able to look to a single point of responsibility for the conduct of the proceeding, that is, a single firm on the record. The defendants so submitted in pursuit of what they described as their interest in protecting the interests of their "current and former customers", the group members. That was a misplaced characterisation of the defendants' position in this litigation, in which the plaintiffs and group members on the one hand, and the defendants on the other, are adversaries.

72 It is well established that the interests of solicitors and funders are not relevant to the exercise of discretion to make orders of the kind sought, or any orders whose object is to manage or resolve multiplicity in group proceedings.[41] It is also well-recognised that except where a group proceeding is self-funded by group members the persons involved, including solicitors and funders, will have their own self-interests.[42]

73 Recognising that fact and then characterising a proposed solution to multiplicity as serving the self-interest of a funder does not assist in identifying how such an order would affect the interests of the relevant parties, namely group members and the defendant. It does not answer the question whether, having regard to those interests, such an order would be appropriate or necessary to ensure that justice is done in the proceeding; it does not determine whether a particular solution would give effect to the overarching purpose. To answer those questions it is necessary to consider the effect of the proposed orders and any alternative from the perspective of the relevant persons (first group members, second, the defendant) and in light of the considerations required to be taken into account in giving effect to the overarching purpose.

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41 See for example *Kirby*, 68–9 [9]–[12], 72 [28]; *Wileypark*, 7–8 [14]–[18]; *Wigmans NSWCA*, 345 [103]–[104] (Meagher and Payne JJA); *Treasury Wine*, [20].

42 See *Wileypark*, 7–8 [14]–[15].

74 The defendants' submissions were addressed to a general theme in the proper administration of justice without taking account of, or seeking to address, the Protocol for the conduct of the litigation, or the evidence of Mr Watson about the successful conduct by his firm, of joint and co-operatively conducted litigation in group proceedings. They did not identify the possible or likely source of a conflict between the solicitors' imputed entrepreneurial ambitions and the conduct of the litigation *vis a vis* the Court. They did not engage with several important elements of the proposed arrangements: that a single set of counsel will be engaged; that applications in the proceeding will be made jointly; that a single address for service will be required; that senior lawyers of each of Maurice Blackburn and JWS will assume responsibility for the joint conduct of the proceeding. As Mr Armstrong QC for Mr Wilkinson put it, on the proposed arrangement there will be real people who will be responsible to the court; senior lawyers with ethical obligations, who will be taking steps in the proceeding. Those senior practitioners will give undertakings to the Court, as will the plaintiffs, to conduct the proceeding in accordance with the standards in the Protocol.

75 As I have said, the proposed arrangements for the conduct of the proceeding will in my assessment facilitate a joint team comprised of lawyers from both firms acting consistently to prosecute litigation on behalf of and in the interests of the plaintiffs and group members. It is relevant to that assessment that the solicitors who will assume responsibility for the conduct of a joint proceeding are very senior and experienced.

76 Furthermore, the fact of consolidation, so that a single proceeding is advanced, and the engagement of a single set of counsel, will effectively answer the forensic concerns that are commonly a reason to refuse to permit more than one solicitor to appear on the record where there is more than one plaintiff in a single proceeding.

77 The defendants' opposition to the proposed consolidation regime did not engage in any substantive way with the approach taken by successive courts to the question of joint representation in the context of overlapping class actions, which is discussed below.

78 I accept that the ordinary course is that a single solicitor's firm should appear on the record for a party. But to the extent that the proposed arrangements were characterised as *irregular* (noting that the defendants did not contend that I did not have power to make an order for joint representation), I reject that submission.

79 There exists a long-standing rule of practice, developed well before courts had to grapple with the problem of multiplicity in group proceedings, that plaintiffs in consolidated proceedings are not entitled, without leave, to permit more than one firm of solicitors to appear on the record where there is more than one plaintiff in a single or consolidated proceeding. Being a rule of practice, it recognises that an order may be made permitting what is usually described as "separate representation". In this case, as in other representative proceedings, what is proposed is more accurately described as "joint" representation.

80 The rule is said to derive from the 1853 case of ***Wedderburn*** *v Wedderburn*.[43] *Wedderburn* did not itself concern the specific question of separate legal representation of plaintiffs in a single action, but stands for the more general proposition that plaintiffs joined in an action must act together, meaning *not inconsistently* from one another.[44] Separate representation may of course give rise to the risk of inconsistency.

81 A particular concern is the forensic difficulty that may be caused at the trial of separately represented plaintiffs.[45] The rule said to have been derived from *Wedderburn* was articulated by the English Court of Appeal in ***Lewis*** *v Daily Telegraph Ltd* as a rule of practice that separate representation of plaintiffs by more than one firm of solicitors on the record is irregular without leave.[46] It may be permitted, including

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43 (1853) 17 Beav 158 (***Wedderburn***); see *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601 (Pearson, Russell and Sellers LJJ) at 619 (***Lewis***).

44 In *Wedderburn* there were five co-plaintiffs. A decree had been made for the taking of accounts but they had not been completed. One of the plaintiffs (Mr Hawkins) moved that in consequence of the plaintiffs' solicitors not proceeding with the case, Mr Hawkins may be at liberty to bring the matter before the Master for the taking of accounts. The Master of the Rolls determined that Mr Hawkins may, with the other plaintiffs, remove their solicitor and the other plaintiffs may allow Mr Hawkins to conduct the proceeding for all of them, but if all of the plaintiffs did not concur, Mr Hawkins could not "take a course of proceeding different and apart from the other plaintiffs, for the consequence would be, that their proceedings might be totally inconsistent." The Master said that he could not "allow one of several plaintiffs to act separately from and inconsistently with the others".

45 See *Lewis* at 620–1.

46 *Lewis*, 619 (Pearson LJ), 623 (Russell LJ), 624 (Sellers LJ).

in a consolidated action, by "special order".[47]

82 A grant of leave will depend on the circumstances of the case. There is no hard and fast rule governing when leave should be granted or refused.[48] In exercising its discretion to grant leave, the Court will ordinarily have regard to both any unfairness or difficulties posed to the defendants or to the Court by separate representation (in particular in relation to costs and forensic problems at trial, which may be acute where plaintiffs engage separate counsel),[49] and any injustice to the plaintiffs caused by refusal to order separate representation.[50]

83 The issue of separate representation has most commonly arisen in the context of conflicts of interest between plaintiffs, in both consolidated and single actions. In that context, courts have been concerned to prevent plaintiffs from acting inconsistently.[51] The circumstances in which joint representation has been considered are varied. Some cases concerned applications for separate counsel rather than separate solicitors.[52] Others concern single rather than consolidated actions, to which different considerations may apply.[53] Other categories of cases involve specific considerations such as the rights of different insurers standing behind the "nominal party" in the insurance context,[54] and the particular requirements of jury trials.[55] Outside of the

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47 *Lewis*, 620 (Pearson LJ). See also *Ong v Ping* [2015] EWHC 3258 (Ch), in which Morgan J recently affirmed *Lewis*.

48 *Fox & Ors v Olsen, Ors & The State of South Australia* [1999] SASC 411, [19] (Mullighan J, Doyle CJ and Wicks J agreeing) (***Fox v Olsen***).

49 See *Lewis,* 620-622 (Pearson LJ); *Goold and Porter Proprietary Limited v Housing Commission* [1974] VR 102, 103 (Norris J) (***Goold***); *Fox v Olsen*, [19] (Mullighan J, Doyle CJ and Wicks J agreeing).

50 See *Lewis,* 622 (Pearson LJ), 623 (Russell LJ); *Goold,* 103 (Norris J); *Fox v Olsen,* [19] (Mullighan J).

51 See for example, *Herbert v Badgery* [1893] 14 LR (NSW) Eq 321, 329 (Owen CJ); *Davey v Watt* (1902) 28 VLR 24 (Holroyd J), and more recently *Buses + 4WD Hire Pty Limited v Oz Snow Adventures Pty Ltd* [2016] NSWSC 1017, [28] (Adamson J).

52 See for example, *Goold*; *SCI Operations Pty Ltd v Australian Paper Manufacturers Ltd* (1983) 51 ALR 365 (***SCI Operations***) at 373 (Woodward J); *Lewis* (which concerned an application both separate solicitors and counsel).

53 See for example *Goold; Carnie v Esada Finance Corporation Ltd* (1996) 38 NSWLR 465 (Young J) (***Carnie***); *SCI Operations.* In *Goold* at 103, Norris J doubted whether the discretion to grant separate representation would exist in non-consolidated actions.

54 See for example, *Tindle v Ansett Transport Industries (Operations) Pty Ltd* (1990) 21 NSWLR 492 (Kirby P, Clarke and Handley JJA) (***Tindle v Ansett***); *Elphick v Westfield Shopping Centre Management Company Pty Ltd* [2011] NSWCA 356 at [2]–[11] (Young JA) (***Elphick***). Both cases involved different insurers (standing behind a 'nominal party') engaging separate solicitors or counsel. *Elphick* itself did not concern an application for such separate representation, but Young JA made some observations on the practice in that particular context.

55 See for example, *Lewis,* 620–22 (Pearson LJ); *Tindle v Ansett*, 500–01 (Kirby P, Clarke and Handley JJA).

context of representative proceedings the rule appears to have been considered relatively infrequently in Australia. In Victoria, the equivalent rule in the context of separate *counsel* (as opposed to solicitors) was affirmed in Victoria in *Goold & Porter Pty Ltd v Housing Commission*.[56] In *Fox v Olsen* in the context of a joint trial of proceedings issued by thirteen separate plaintiffs against a common respondent the Full Court of the Supreme Court of South Australia considered the practice in respect of solicitors on the record. Noting that it was accepted in *Lewis* that separate representation may be permitted, Mullighan J said that it is clear that there can be no hard and fast rule informing the application of the discretion to dispense with the usual rule requiring common representation, which may be departed from in an appropriate case.[57]

84 The contexts within which the question of separate or "joint" representation has been considered are fact-sensitive and the cases do not lend themselves to the articulation of general principles, save for identification of the general rule of practice and a general discretion to make a different order.

85 Where separate representation is permitted the general rule is that it will be proper for an unsuccessful party on the opposing side to be burdened with only one set of adverse costs.[58] In this case, as I have said, an order permitting two solicitors on the record will not be at the defendants' expense.

86 Overlapping group proceedings provide a particular context for the exercise of discretion to grant leave for joint plaintiffs to be jointly represented.

87 As Murphy J observed in ***Southernwood*** *v Brambles,* the Federal Court has regularly made orders to consolidate competing class actions and to permit two firms of solicitors to represent the applicants in the consolidated proceeding.[59] In an early

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56 More recently cited in *Maisano v Bodycorp Repairers* [2015] VSC 365, [7] (Elliott J).

57 *Fox v Olsen*, [19].

58 *McKay Super Solutions v Bellamy's Australia (No 2)* (2019) 135 ACSR 278 [37]–[38], [46]–[48] (Beach J).

59 *Southernwood*, 553 [55]; see *Johnson Tiles*; *Gaby Hadchiti and Others v Nufarm Limited* (NSD 1847/2010) (**Nufarm Class Action**); *Stanford v DePuy International Ltd* (NSD213/2011) (**DePuy Hips Class Action**); *Cheryl Whittenbury v Vocation Ltd (in liq)* (VID434/2015) (**Vocation Class Action**); *Kuterba v Sirtex Medical Ltd* [2018] FCA 1467; *Kirby*; *Carnie*.

example of such an order more than two decades ago in ***Johnson Tiles*** *Pty Ltd v Esso Australia Ltd*, Merkel J made an order permitting two firms to appear on the record, holding that although the usual course was for only one solicitor to appear on the record, the consequences of separate representation considered in *Lewis* would not arise where the parties had agreed to engage one set of counsel to represent all applicants and group members, and there was otherwise no basis on which to conclude that permitting joint representation would be prejudicial to group members or to the defendant. [60]

88 Murphy J went on to say in *Southernwood*, that the older authorities concerning separate representation must, in the context of group proceedings, be understood in light of the power conferred by s 33ZF to make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceeding, and should be not understood as derogating from that power.[61] They should also be considered in light of the obligation of courts to promote the overarching purpose.[62] With respect, I agree.

89 In ***Klemweb*** *Nominees v BHP* the Full Court of the Federal Court, re-exercising a discretion to make orders dealing with competing group proceedings, accepted the parties' proposal to consolidate two of the proceedings in issue. The Court endorsed the approach taken by Murphy J in *Southernwood* allowing consolidation with joint representation, on terms including a co-operation protocol in similar terms to the one proposed in this case (although without Cost Limiting Orders or undertakings). Lee J said that it was required in making orders effecting consolidation, that the Court be satisfied that the future conduct of the consolidated proceeding is likely to be consistent with the interests of group members and with the overarching purpose.[63]

90 In a slightly different but related context, in *Bellamy's Australia Ltd v Basil,*[64] a

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60 *Johnson Tiles*, [69]–[72].

61 Section 33ZF of the *Federal Court Act* and s 33ZF of the *Supreme Court Act* (Vic) which are in materially identical form.

62 *Southernwood*, 553–4 [55]–[58].

63 *Klemweb*, 615-17 [155]–[160] (Lee J, Middleton and Beach JJ agreeing at 590, [34]).

64 *Bellamy's Australia Ltd v Basil; Bellamy's Australia Ltd v McKay Super Solutions Pty Ltd (as trustee for the McKay Super Solutions Fund)* (2018) 372 ALR 638 (Murphy, Gleeson and Lee JJ) (***Bellamy's FCFC***).

differently constituted Full Court of the Federal Court (Murphy, Gleeson and Lee JJ) refused leave to appeal against the trial judge's refusal to impose a "cost capping order" limiting the applicant's recoverable costs to a specified amount at an early stage of the proceedings. There, the respondent had submitted that the trial judge had failed to apply the general principle that in the absence of an identified exception, where separate representation is allowed, multiple applicants cannot choose to be separately represented at *the respondent's expense*. Their Honours observed that costs rule had been developed in the "*different context of ordinary inter partes litigation*",[65] and did not mandate an exercise of discretion imposing a costs-capping order. Separately, their Honours said:

> As has been repeatedly stressed, the remedial expedient to be adopted when the Court is faced with competing class actions calls for discretionary judgments informed by all the circumstances of the case. Unsurprisingly, such judgments are ones upon which minds can (and do) legitimately differ. What is evident from recent decisions of the Full Court in *GetSwift* and *Klemweb* is that not only do docket judges have considerable latitude to fashion a solution to deal with multiplicity of class actions, but also that the issue of potential duplication of costs is a relevant discretionary factor fastening upon the appropriate case management solution.[66]

91 The defendants emphasised an *ex tempore* decision of Hammerschlag J of the New South Wales Supreme Court in *Pallas*, in which the plaintiffs in overlapping group proceedings proposed consolidation with joint representation. His Honour rejected the proposal and ordered consolidation with a view to appointing a single law firm to represent the class and said that the solicitor who would be on the record could, on instructions, enter into arrangements with the other firm to be consulted or for the workload to be shared. The terms on which that might be done were a matter for the parties and could be left to them.[67]

92 I take a different view as to the appropriateness of such an approach, on the facts before me. I consider that leaving arrangements to the parties suffers from the real disadvantage of a lack of transparency. I do not accept the defendants' contention that this is not a proper concern of the Court. It is relevant to the Court's supervisory

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65 *Bellamy's FCFC*, 643 [23]–[24].
66 *Bellamy's FCFC,* 643 [20].
67 *Pallas*, [29].

jurisdiction over group members.[68] More fundamentally, it also concerns the Court's interest in effective case management, in furtherance of the overarching purpose. It is of note that the defendants' attraction to the course taken in *Pallas* sits inconsistently with their professed desire to avoid any arrangement that might increase their potential exposure to adverse costs and difficulties on any taxation of costs. How such an arrangement would assuage those concerns was not explained. Such private arrangements have the potential to result in complexities on taxation, which complexities will be mitigated under the plaintiffs' proposal.

93 As discussed earlier, Part 4A and its cognates, by design, contemplate multiplicity of proceedings; a claimant has a choice as to whether to bring proceedings on behalf of *some or all person*s who have claims arising out of the same, similar or related circumstances, and group members may opt-out of proceedings. The result is that separate individual or representative proceedings may be brought against the same defendant.[69] In these respects and others, this is fundamentally different to other forms of litigation. The *Lewis* line of authorities must be considered in light of the multiplicity question which, as the High Court said in *Wigmans*, is posed but not solved by contemporary legislation enabling group proceedings.[70] That is not to say that it is necessary to promulgate a fixed or even a *prima facie* rule permitting joint representation in group proceedings. It is only to say that when considering whether to exercise a discretion to allow joint representation in a group proceeding, a relevant consideration may well be the need for the Court to fix upon an appropriate solution to the multiplicity problem, applying the principles discussed. Those circumstances and the specific proposal under consideration, in the context of the evidence before the court, might establish a proper basis for the exercise of discretion, as it does here.

94 For the reasons given, I consider that leave for joint solicitors on the record should be granted.

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68 See for example s 33V of the Act; *Wigmans HCA,* 293 [82].
69 *GetSwift*, 125 [146]; *Bellamy's*, [34]–[36].
70 *Wigmans HCA*, 291–2 [77].

Disposition

95 For the above-mentioned reasons I consider that the plaintiffs' application for consolidation of the proceedings should be granted. It appropriately protects the interests of group members. It does not prejudice the defendants. It solves the multiplicity problem with which the court must grapple, in a way that is consistent with the overarching purpose.

ANNEXURE

Substance of Orders and Undertakings

Consolidation

1. Pursuant to Rule 9.12 of the *Supreme Court (General Civil Procedure) Rules 2015* (the **Rules**) and section 33ZF of the *Supreme Court Act 1986* (Vic) (**Act**), the proceeding *Jordan Wilkinson v Allianz Australia Insurance Limited* (S ECI 2020 04230) (**Wilkinson Proceeding**) be consolidated with the proceeding *Tracy-Ann Fuller v Allianz Australia Insurance Limited and another* (S ECI 2020 02853) (**Fuller Proceeding**) and the consolidated proceeding be known as *Tracy-Ann Fuller and Jordan Wilkinson v Allianz Australia Insurance Limited and another* to be identified as S ECI 2020 02853 (**Consolidated Proceeding**).

2. The plaintiff in the Fuller Proceeding (**Fuller Plaintiff**) and the plaintiff in the Wilkinson Proceeding (**Wilkinson Plaintiff**) are to be the joint representative plaintiffs in the Consolidated Proceeding (**plaintiffs**).

3. Maurice Blackburn Pty Ltd (**Maurice Blackburn**) and Johnson Winter & Slattery (together, the **Lawyers**) are granted leave to be jointly named as solicitors on the record for the plaintiffs in the Consolidated Proceeding.

4. Order 3 is subject to the provision of:

   (a) an undertaking by each of the Fuller Plaintiff and the Wilkinson Plaintiff in the form that appears below; and

   (b) an undertaking by each of Johnson Winter & Slattery and Maurice Blackburn, by their representatives, in the form that appears below.

5. Subject to further order, costs incurred in the Fuller Proceeding and the Wilkinson Proceeding will be costs in the Consolidated Proceeding.

6. The costs of any work performed in the Consolidated Proceeding on and after the date of these orders that is performed by reason of there being two firms jointly representing the Plaintiffs rather than one firm (**Duplicated Work**):

   (c) not be recoverable against group members in the Consolidated Proceeding;

   (d) not be recoverable against the defendants in the Consolidated Proceeding.

Consolidated pleading

7. By 24 September 2021, the plaintiffs are to file and serve a consolidated writ and consolidated statement of claim.

8. By 22 October 2021, the defendants are to file and serve a defence to the consolidated statement of claim.

9. By 5 November 2021, the plaintiffs are to file and serve any reply to the defendants' defence.

Costs referee

10. Pursuant to Rule 50.01 of the Rules and section 33ZF of the Act, a special referee (**costs referee**) be appointed for the purpose of:

    (a) conducting inquiries every six months (commencing one month from the date of these orders) as to the question whether there is any and if so what work being performed by reason of there being two firms jointly representing the plaintiffs rather than one firm (Duplicated Work);

    (b) providing confidential written reports to the Court and the Lawyers every six months (within one month of the completion of each inquiry), which state that costs referee's opinion on the question in 10(a), identifying and describing any Duplicated Work in sufficient detail, and retaining such records from the referees' inquiries, to enable the quantification of the costs relating to any Duplicated Work, at a later time.

11. The Lawyers must provide such information, access to personnel and access to documents as the costs referee may require.

12. The reasonable fees of the costs referee shall be borne equally by the plaintiffs in the Consolidated Proceeding and shall not be recoverable against the defendants in the Consolidated Proceeding.

UNDERTAKING – JOINT PLAINTIFFS

[Jordan Wilkinson / Tracy Ann-Fuller] undertakes to the Court to enter into the Cooperative Litigation Protocol annexed to the orders of the Court dated [date], and undertakes to instruct [his / her] solicitors [Johnson Winter & Slattery / Maurice Blackburn Pty Ltd] to comply with the Cooperative Litigation Protocol in conducting the consolidated proceeding.

Signature_____

[Jordan Wilkinson / Tracy Ann-Fuller]

Date of signature: [insert]

UNDERTAKING – SOLICITORS ON THE RECORD FOR THE PLAINTIFFS

[Johnson Winter & Slattery / Maurice Blackburn Pty Ltd] undertakes to the Court to conduct the Consolidated Proceeding in accordance with the Cooperative Litigation Protocol annexed to the orders of the Court dates [insert].

Signature_____

On behalf of: [Johnson Winter & Slattery/ Maurice Blackburn Pty Ltd]

Signatory: [insert]
Capacity: [insert]
Date of signature: [insert]

SCHEDULE OF PARTIES

S ECI 2020 02853

TRACY ANN-FULLER

Plaintiff

and

ALLIANZ AUSTRALIA LIMITED (ACN 000 122 850)

First Defendant

and

ALLIANZ AUSTRALIA LIFE INSURANCE LIMITED (ACN 076 033 782)

Second Defendant